Hii Su Choo & Ors v Gading ak Sakudan/Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 20-41-31 OF 1996
TEE AH SING J
2 JULY 1997

Criminal Procedure *— Jurisdiction of court — Magistrate's court — Inquiry under s 413 of the Criminal Procedure Code (FMS Cap 6) — Whether magistrate deciding case under this section may decide question of title — Whether order should be confined only to question of possession — Criminal Procedure Code (FMS Cap 6) s 413(1)*

The respondent had alleged that a jar belonging to her late husband — which was in the possession of the appellants ('the applicants') — was stolen in 1986. An inquiry under s 413 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') was held by the magistrate after which it was ordered that the jar be delivered to the respondent unconditionally. The applicants filed a notice of appeal against the order of the magistrate. It was submitted that s 413 of the CPC concerns possession and it was not for the criminal court to decide who was the rightful owner. The applicants alleged that they purchased the jar in 1986 from a shop and a receipt was issued. They were in possession of the jar immediately prior to the seizure by the police. It was argued that the jar should be returned to them pending the disposal of the case by the police. It was also argued that if there was any claim by the respondent, the matter should be referred to a civil court.

Held, setting aside the order of the magistrate and ordering that the jar be delivered to the applicants:

The duty of the magistrate under s 413(1) of the CPC is to make an inquiry as to the person entitled to possession and to order possession to be given to him. The magistrate deciding the case under this section should not decide any question of title but must confine his order only to question of possession.

In the present case, the applicants were bona fide purchasers of the jar. There was nothing to suggest that the possession of the jar by the applicants was dishonest or unlawful. Accordingly, the applicants were the persons entitled to the possession of the jar. Therefore, the magistrate was wrong in ordering that the jar be given to the respondent as the magistrate had gone into the issue of who had title (ownership) of the jar. The issue of whether the respondent had positively identified the jar not produced in court as the one reportedly stolen from her late husband involved question of title and the proper forum to adjudicate on it is a civil court (see pp 724C–I and 725A); *Lakshmichand v Gopikisan* AIR 1936 Bom 171 followed.

Obiter:

There is no right of appeal in respect of an inquiry under s 413 of the CPC. Therefore, the hearing of this appeal should be by way of revision under s 325 of the CPC (see p 722E–F).

A [**Bahasa Malaysia summary**

Penentang telah mengatakan bahawa sebuah balang kepunyaan mendiang suaminya — yang berada dalam milikan perayu-perayu ('pemohon-pemohon') — telah dicuri pada tahun 1986. Siasatan di bawah s 413 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') telah B dijalankan oleh majistret dan selepas itu ia diperintahkan bahawa balang dihantar-serah kepada penentang tanpa syarat. Pemohon-pemohon memfailkan satu notis rayuan terhadap perintah majistret. Ia dihujahkan bahawa s 413 KAJ adalah berkenaan milikan dan bukannya untuk mahkamah jenayah memutuskan siapakah yang merupakan pemilik sah. Pemohon-pemohon mengatakan bahawa C mereka telah membeli balang itu pada tahun 1986 dari sebuah kedai dan suatu resit telah dikeluarkan. Mereka mempunyai milikan ke atas balang itu sejurus sebelum penyitaan oleh pihak polis. Ia dihujahkan bahawa balang itu harus dipulangkan kepada mereka sementara menunggu penyelesaian kes oleh pihak polis. Adalah juga D dihujahkan bahawa sekiranya terdapat apa-apa tuntutan oleh penentang, perkara ini harus dirujuk kepada sebuah mahkamah sivil.

Diputuskan, mengetepikan perintah majistret dan memerintahkan bahawa balang itu dihantar-serah kepada pemohon-pemohon:

E Tugas majistret di bawah s 413(1) KAJ adalah untuk membuat suatu siasatan tentang orang yang berhak mendapat milikan dan untuk memerintahkan milikan diberikan kepadanya. Majistret yang memutuskan kes di bawah seksyen ini tidak patut memutuskan mana-mana persoalan hakmilik tetapi mesti menghadkan perintah beliau kepada persoalan milikan sahaja.

F Dalam kes ini, pemohon-pemohon adalah pembeli bona fide balang itu. Tiada apa-apa untuk mencadangkan bahawa pemilikan balang itu oleh pemohon-pemohon adalah tidak jujur atau tidak sah. Oleh itu, pemohon-pemohon adalah orang yang berhak kepada pemilikan balang itu. Oleh yang demikian, majistret terkhilaf dalam G memerintahkan bahawa balang itu diberikan kepada penentang kerana majistret telah memperbincangkan isu tentang siapakah mempunyai hakmilik (pemunyaan) ke atas balang itu. Isu mengenai sama ada penentang mengenal pasti balang itu secara positif yang tidak dikemukakan di mahkamah sebagai balang yang kononnya telah dicuri daripada mendiang suaminya membabitkan persoalan hakmilik dan forum H yang betul untuk menghakimi adalah mahkamah sivil (lihat ms 724C–I dan 725A); *Lakshmichand v Gopikisan* AIR 1936 Bom 171 diikut.

Obiter:

Tiada hak untuk merayu berkenaan dengan suatu siasatan di bawah I s 413 KAJ. Maka, pembicaraan rayuan ini haruslah berlaku menerusi penyemakan di bawah s 325 KAJ (lihat ms 722E–F).]

Notes

For cases on jurisdiction of the magistrate's court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1536–1572.

Case referred to

Lakshmichand v Gopikisan AIR 1936 Bom 171 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 325, 413(1)

Robin Hii (*Robin Hii & Co*) for the applicants.
Respondent in person.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor) as amicus curiae.

Cur Adv Vult

Tee Ah Sing J: On 9 February 1996, the learned magistrate after holding an inquiry under s 413 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') ordered that the jar be delivered to Gading ak Sakudan ('the respondent') unconditionally.

The unsuccessful claimants for possession ('the appellants') filed notice of appeal against the order of the learned magistrate.

On the hearing of the appeal, the learned deputy public prosecutor ('the DPP') raised the preliminary issue that there is no right of appeal in respect of an inquiry under s 413 of the CPC and that this appeal should be by way of revision.

Learned counsel for the appellants conceded that the hearing of the appeal should be by way of revision under s 325 of the CPC. So in this revision, the appellants will hereinafter be referred to as the applicants.

Learned counsel for the applicants submitted that the learned magistrate did not give any reason at all why he returned the jar which was not tendered to the court to Gading ak Sakudan (the respondent) unconditionally even though the criminal investigation is still on. In this case, his client Hii Su Choo alleged that he purchased the jar on 16 May 1986 from Liaw Fong Hon. Liaw Fong Hon purchased the jar sometime in 1983.

On the other hand, the respondent Gading ak Sakudan alleged that the jar which belong to her late husband was stolen on 12 May 1986.

Immediately before the seizure of the jar by the police on 28 January 1995, the jar was kept at the lobby of Kingwood Hotel, Sibu.

It was submitted that s 413 of the CPC concerns possession and it is not for the criminal court to decide who is the rightful owner. It is for the civil court to decide on the ownership.

In this case, his clients were in possession of the jar immediately prior to the seizure by the police and it should be returned to his clients on bond pending the disposal of the case by the police. According to his clients, they came into possession of the jar legally. On the other hand, the respondent said that his clients' possession was not legal because the jar was stolen from her late husband. So, since there is a doubt here, the

A benefit of doubt should be given to his clients. And if there is any claim by Gading ak Sakudan (the respondent), the matter should be referred to a civil court. It was also submitted that since no letter of administration has been granted to the respondent, the court should not give custody of the jar to her.

B The respondent in her submission maintained what she had said during the inquiry before the learned magistrate.

The learned DPP who appeared as amicus curiae submitted that the issue of letter of administration does not arise as it is a case of inquiry under s 413 of the CPC and hence it is not a civil suit.

C He submitted that from Timoti ak Chundi's evidence there was positive identification of the jar. He further submitted that P2 is a photograph of the jar and P3, a photograph of the sister standing beside the jar. The photographs were taken before the theft. The release of the jar was unconditional as there is no case pending. He submitted that the chain of evidence adduced in the court below is quite consistent as far as the D claim of the respondent is concerned and there was no miscarriage of justice.

Learned counsel for the applicants in reply submitted that the photographs produced are not admissible because the negatives were not produced and the photographer did not testify. He submitted that there are in fact two similar jars in the Sarawak Museum, Kuching. It was E submitted that we cannot say positively at this moment whether the jar in the last possession of the third applicant was in fact the jar allegedly stolen from the late husband of Gading ak Sakudan. He submitted that if the title to the seized property is doubtful, it should be returned to the person from whom it was seized. In support, he cited Sohoni's *The Code of Criminal Procedure* (17th Ed, 1973) at p 4071 para 22.

F Section 413(1) of the CPC reads as follows:

> The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting G the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

Section 457 of the Indian Criminal Procedure Code is in pari materia with s 413(1) of our CPC.

H In Sohoni's *The Code of Criminal Procedure* (19th Ed, 1973) Vol 5 at p 5092 para 22 states as follows:

> *Entitled to possession, evidence of ownership.* The magistrate has to give the petitioners a due opportunity for establishing their claims for return of seized property. The magistrate deciding the case under this section should I not decide any question of title, but must confine his order only to the question of possession. The words 'entitled to possession' have also been used in s 452(1). It has been held in respect of them that they do not refer to any question of title other than question of title to the property based on possession, and what, therefore, the court has to decide is this: who is

'entitled to possession' of the property. The remedy of the other side is by way of a civil suit. A

When the material is lacking to decide the question as to who is entitled to possession of the property seized, then the order for disposal should be in favour of the person from whom it was seized.

From the evidence adduced, it is clear that the jar was produced before the court during the inquiry to be identified by the opposing claimants. B

In view of the opposing claimants, the learned magistrate was correct in holding an inquiry. Thus, I am of the view that the duty of the magistrate under s 413(1) of the CPC is to make an inquiry as to the person entitled to possession and to order possession to be given to him. C

The magistrate deciding the case under this section should not decide any question of title but must confine his order only to the question of possession.

In the case of *Lakshmichand v Gopikisan* AIR 1936 Bom 171, his Lordship at p 172 said: D

> Under s 523, what the magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then in my opinion the magistrate can only hold that that person is entitled to possession of the property. That is the rule which prevails in Madras, see 56 Mad 654(1), and in Calcutta, see 54 Cal 283(2), and this court recently held that the same rule applies to a case arising under s 517; vide Cri Rev Appln No 65 of 1935(3). If the complainant considers that the applicant has no title to the property, he has a remedy in a civil court, but the burden will be upon him to prove his title. E F

In our case, Hii Su Choo has adduced evidence that he purchased the jar on 16 May 1986 from Liaw Fong Hon @ Lew Hoi Khiong, the owner of Sarawak (Philip) Arts in Miri for RM7,000. He was issued with a receipt (P4). Liaw Fong Hon has stated that the jar was in his shop showroom on display for three years before it was sold to Hii Su Choo. So it can be inferred that the jar was purchased by Liaw Fong Hon's elder brother in 1983 from an Iban for RM2,700 before the alleged theft of the jar on 12 May 1986. I am of the view that Hii Su Choo was a bona fide purchaser of the jar on 16 May 1986 from Sarawak (Philip) Arts shop. There is nothing to suggest that the possession of the jar by Hii Su Choo was dishonest. Further, there was no one charged for the offence of theft or retaining stolen property. Furthermore, there was no evidence adduced that Hii Su Choo has committed any offence. So there was no evidence that the possession of the jar by Hii Su Choo was unlawful. I am of the view that Hii Su Choo was the person entitled to the possession of the jar. G H I

I am of the opinion that the learned magistrate was wrong in ordering that the jar be given to the respondent as the learned magistrate has gone into the issue of who has title (ownership) of the jar.

A The issue of whether the respondent and her son have positively identified the jar not produced in court as the one reportedly stolen from her late husband on 12 May 1986 involves question of title and the proper forum to adjudicate on it is a civil court.

In view of the foregoing, I set aside the order of the learned magistrate B and substitute thereto an order that the jar be delivered to Hii Su Choo through the Magistrate's Court, Sibu within 14 days hereof. Of course, this court does not in any way prohibit the respondent, if she is so minded, from instituting proceedings against Hii Su Choo or any other person in the civil court relating to the jar.

C *Order accordingly.*

Reported by Jafisah Jaafar

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